No. 15-420

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA., PETITIONER

v.

MICHAEL BRYANT, JR.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR CITIZENS EQUAL RIGHTS FOUNDATION AS AMICUS CURIAE SUPPORTING RESPONDENT

JAMES J. DEVINE, JR.
Counsel of Record
128 Main Street
Oneida, New York 13421
JDevine@centralny.twcbc.com
(315) 363-6600

CURRY & TAYLOR • (202) 393-4141

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Interest of the *Amicus Curiae*

The Citizen Equal Rights Foundation (CERF) was established by the Citizens Equal Rights Alliance (CERA). Both CERA and CERF are South Dakota non-profit corporations. CERA has both Indian and non-Indian members in 34 states. CERF was established to protect and support the constitutional rights of all people, to provide education and training concerning constitutional rights, and to participate in legal actions that adversely impact constitutional rights of CERA members. CERA has two Native American board members who live within reservation boundaries with their families. All of CERA's members understand that a Native American living in Indian country has no constitutional rights.

CERF submits this *amicus curiae* brief to add the perspective of its members that the Constitution should apply to all persons in the United States and to all lands within the exterior boundaries of the United States. CERF firmly believes that the United States government should be promoting the interests of all of its citizens on an equal basis. This case addresses whether Mr. Bryant has any due process or 6th Amendment rights. It is the categorization of the lands as Indian country that removes them not only from state jurisdiction but from the application of the Constitution of the United States.

Both parties have consented by letter to the filing of this *amicus curiae* brief.[1]

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[1] Pursuant to Rule 37.6 of the Court, no counsel for a party has authored this brief, in whole or in part. No person or entity, other than *amicus curiae*, CERF, its members or its parent CERA's members, or its counsel have made any monetary contribution to the preparation or submission of this brief.

Summary of the Argument

This brief will explain how it is the decisions of this Court that have deprived defendant Bryant of all of his constitutional rights. This *amicus* will not address specifically the 6th Amendment concerns so ably handled in the Response Brief. CERF believes its role is to present the broader picture as to why Mr. Michael Bryant, Jr. is not protected by the Bill of Rights and the Fourteenth Amendment or any other parts of the Constitution as a citizen of the United States. It begins with a basic historical summary of how the early United States modified the European Doctrine of Discovery and made Native Americans eligible for full citizenship. It then explains how the Native Americans were crossed into the slavery debate with *Dred Scott v. Sandford*, 60 U.S. 393 (1857) and then kept in this status under the federal Indian policy of 1871.

The second section of this brief will analyze the opinion in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978) and why the Indian Civil Rights Act (ICRA), 25 U.S.C. § 1301-1303, was found to be unenforceable. The brief will then suggest how *Santa Clara Pueblo* was correct in finding that the ICRA was not intended by Congress to create any actual rights in individual Native Americans. It will then demonstrate how the unlimited territorial power unleashed in the *Scott v. Sandford* decision has current application in law by proving how Richard Nixon used the *Dred Scott* opinion in specific legislation in 1966 to deliberately contradict specific constitutional structural safeguards. It will then explain how *Santa Clara* can be distinguished to guarantee individual constitutional rights to all Native Americans no matter where they live.

The final section of this brief will discuss how this Court can enforce a decision guaranteeing due process rights to all individual Native Americans. This includes confronting how Congress cannot retain plenary power over the Indians under any form of classification in the 21st century. It is long past time to make all people of the United States equal before the law.

ARGUMENT

Because this Court has managed to preserve the rationale of the worst case ever decided by it in federal Indian law for more than150 years, *amicus* CERF apologizes in advance for the blunt language contained in this brief. CERF has been consistently making many of these legal points for 20 years now trying to get this Court to restore its own position as the ultimate interpreter of the Constitution of the United States and protector of individual rights. Only if this Court reasserts its position can it protect the constitutional rights of all Americans from the unlimited power of government as has been allowed to happen against all Native Americans still residing on Indian reservations.

I. THE HISTORY OF FEDERAL INDIAN POLICY IS REALLY THE HISTORY OF TWO CONTRADICTORY POLICIES THAT HAVE NEVER BEEN RECONCILED

The assimilation policy of the young United States and the Indian policy of 1871 are two completely separate and contradictory policies. They are not compatible in any conceivable way. Justice Thomas in his concurring opinion in *United States v. Lara*, 541

U.S. 193 (2004) called federal Indian policy schizophrenic because the original assimilation policy and the Indian war policy of 1871 are contradictory. *Id.* at 219. Justice Thomas could not have been more right. Even more disturbing is that what we consider modern federal Indian policy dating from the adoption of the Indian Reorganization Act of 1934 was really a continuation and expansion of the 1871 policy. The same is true of the self determination policy or Nixon Indian policy. This Court has wrongfully assumed that federal Indian policy was merely a policy to help the Indians and did not have a more insidious purpose to expand or preserve powers that were supposed to be extra constitutional.

a. The Doctrine of Discovery was Modified in the Young United States to Allow Native Americans to Become Full Citizens.

The main policy and purpose of the nascent United States toward Native Americans was the acquisition and domestication of territorial land. The Indian Commerce Clause, Art. I, Sec. 8, Cl. 3, was developed to avoid military conflict in the territorial lands allowing continued settlement and expansion of civilization. Only lands ceded by States outside of their boundaries were deemed "federal territory" under the Property Clause, Art. IV, Sec. 3, Cl. 2. This was the first major change to the European doctrine of discovery. Under the harsh European doctrine any lands within or without a nation/state that were conquered became the territory of the conqueror. This war power doctrine of "might makes right" had been modified some by the British to make it less

devastating to native peoples than the same doctrine applied by Spain or the Dutch. The British doctrine of discovery was applied to expand their empire and trade. Conquered natives that were capable of becoming consumers of British goods were subjugated but not exterminated. The organized natives were allowed to remain on the conquered land at the pleasure of the British sovereign. The natives had no legal title interest in the land unless they swore fealty to the British sovereign by treaty and acquired his permission for continued occupancy. The Treaty of Paris that ended the war between Great Britain and the new United States ceded all the direct British claims of sovereignty over the Colonies and British land grants but did not resolve any claim considered to be an individual or private claim. Since the United States was using the inherited British law as the basis of its own law, the questions as to the individual claims were not going to be easily resolved. The individual claims included the remaining sovereign rights of the individual Indian tribes.

These major issues regarding how sovereignty was going to be divided were generally resolved in the Northwest Ordinance of 1787 originally under the Articles of Confederation, and then adopted as the first law passed by Congress under the new Constitution. The Organic Act of 1787 as it was called as passed under the Constitution was written to attempt to reconcile the British discovery doctrine with the new enlightened views of our experiment in self-government. *Johnson v. McIntosh*, 21 U.S. 543, 588-90 (1823). The Northwest Ordinance in Article 3 contained a written federal Indian policy designed to protect and assimilate the Native Americans. It also contained a specific provision prohibiting slavery in Article 6. Not

allowing Native Americans to be considered property of the conquering sovereign was a major difference from how the Spanish treated the natives under the doctrine of discovery. As outlined in the Northwest Ordinance it was assumed that Native Americans would assimilate and become state citizens over time.

The Northwest Ordinance contained the basic Indian policy but few details of how to legally acquire land from Native Americans and tribes. The development of federal territorial law required decisions on how to legally acquire lands from Indian tribes to allow those lands to become part of the public domain subject to disposal under the Homestead Acts and other federal cession laws as required by the Property Clause. The "Indian title" case of *Johnson v. McIntosh*, 21 U.S. 543 (1823) presented the problem of whether the United States was the successor to the sovereignty established by England over the Northwest Territory and former colonies as to these remaining individual and private claims. In a clever application of constitutional law, Chief Justice Marshall preserved the concept of "Indian title" but divested it from its origins in the European discovery doctrine by ruling that only the United States as the winner of the Revolutionary War had the authority to accept the Indian land cessions by treaty. This effectively made unenforceable any individual grants made to British officers in treaties and negated the promises made by the British to the various tribes for their fealty.

This was not a federalism question because the United States Congress as part of the compromise to enable the Louisiana Purchase had passed a statute authorizing the President to negotiate the removal of

any Indian tribe East of the Mississippi to the Western territories. The same statute conceded that those Indians and Indian Tribes that remained in the Eastern States were under state jurisdiction. *See* Act of March 26, 1804, § 15, 2 Stat. 289. This act has never been repealed.

In the 1820's the President began to vigorously pursue a removal policy of all Indians east of the Mississippi River. Congress passed the federal Removal Act of 1830, 4 Stat. 411, to define and enforce the removal policy agreed to in 1804. The Removal Act was specifically drafted to meet the obligations of the federal government to the States to remove the Indians, dispose of the "Indian title" to the lands they occupied and fulfill their federal treaty interests on actual federal territory West of the Mississippi as required by the 1804 Louisiana Purchase statute so that state jurisdiction would no longer be impaired in the Eastern states.

Chief Justice Marshall disagreed with the Removal Act policy defined by Congress and tried to interfere with it by his rulings in *Cherokee Nation v. Georgia*, 30 U.S. (5 Peters) 1 (1831) and *Worcester v. Georgia*, 31 U.S. 515 (1832). Congress responded by passing the 1834 Indian Trade and Intercourse Act, 4 Stat. 729, deliberately ceding that all Indian tribes and Indian land East of the Mississippi River would no longer be under federal protection once their lands were exchanged pursuant to the Removal Act, overruling *Worcester* by statute. The removal policy deliberately displaced the remaining Eastern Indians from their ancestral lands to make way for European settlement. Nowhere was this more obvious than the

infamous "Trail of Tears." The young nation to progress had to displace the old and complacent sentimental views of Native Americans to their vast areas of land that to European eyes were wild and needed to be put into production. Admittedly, some of these removals were little more than deliberate stealing of the valuable Indian lands for exchanges for undeveloped lands in the Western Territories.

This early United States Indian policy was not genocide. This assimilation Indian policy encouraged Indians to be domesticated to the European ways just as immigrants from all countries were being included within the "melting pot" of all people making up the new United States. This Assimilation Indian policy was far from perfect or ideal. Those Indians who wished to retain their tribal customs and ways were removed to federal territories not yet admitted as states. This gave these removed Indians more time and another chance to domesticate themselves to become citizens of what would be new states. This Indian policy lasted into the 1850's when the issues of slavery began to dominate all issues regarding acquisition of additional federal territorial land and the admittance of new states.

Territorial land law by English definition encompassed the war powers necessary to civilize and domesticate the new land. Congress has plenary territorial war power authority to determine the processes and rights of persons in the territories until those territories become States. *See American Insurance Co. v. Canter*, 26 U.S. 511 (1828). Importantly, the distinction made by the English as to domestic versus territorial law had been a major cause of the Revolutionary War itself by denying to the colonists the constitutional rights of Englishmen. The Framers of our Constitution because of this distinction

in fundamental rights between the application of domestic and territorial law specifically required that Congress "dispose of the territories." Property Clause, Art. IV, Sec. 3, Cl. 2. This requirement to dispose of the territory and create new States was defined by this Court as allowing the United States to retain territorial land only on a temporary basis. *See Pollard's Lessee v. Hagan*, 44 U.S. 212, 221 (1845). This specific requirement was meant to prevent the United States from being able to use the territorial war powers as domestic law against the States and individuals. It is one of the most fundamental pieces of the structure of our Constitution.

From the beginning there were skirmishes with the Indian tribes. Under the Assimilation policy of the early days of the nascent United States these skirmishes were viewed as temporary uprisings. The Seneca uprising in New York in 1779 required the federal courts to create a temporary federal common law designation to deal with New York's temporary loss of jurisdiction assumed by the United States Army. As a matter of federal Indian common law, the federal courts interpreted these conflict zones as "Indian country." *See generally United States v. Donnelly*, 228 U.S. 243 (1913). Acknowledging a temporary status of "Indian country" because of an Indian uprising did not change the underlying ownership or jurisdiction of the land. *See Fletcher v. Peck*, 10 U.S. 87 (1810). As a matter of federal law, the Seneca lands in the State of New York never left state jurisdiction. *See United States ex rel Kennedy v. Tyler*, 269 U.S. 13 (1925).

b. The 1871 Indian Policy Was a Step Backwards Toward the European Doctrine of Discovery Placing Unlimited Authority in the National Government over Indians

The *Dred Scott* decision is most remembered for its positions on slavery. *Dred Scott v. Sandford*, 60 U.S. 393 (1857). What is not generally recognized is that the majority opinion of Chief Justice Roger B. Taney compared and contrasted the rights of Indians to the rights of slaves to justify its harsh statements that Negro persons could never become citizens. *Id.* at 404, 420. In *Dred Scott*, Chief Justice Taney separated the Indians from former slaves by concluding that all Indians Tribes were foreign governments.

> "These Indian Governments were regarded and treated as foreign Governments, as much so as if an ocean had separated the red man from the white; and their freedom has constantly been acknowledged, from the time of the first emigration to the English colonies to the present day, by the different Governments which succeeded each other." *Scott* at 404.

To be a foreign government, Chief Justice Taney assumed that each Indian tribe occupied its own sovereign territory.

> "The situation of this population (Negroes) was altogether unlike that of the Indian race. The latter, it is true, formed no part of the colonial communities, and never amalgamated with them in social connections or in government. But although they were uncivilized, they were yet a

> free and independent people, associated together in nations or tribes, and governed by their own laws. Many of these political communities were situated in territories to which the white race claimed the ultimate right of dominion. But that claim was acknowledged to be subject to the right of the Indians to occupy it as long as they thought proper, and neither the English or the colonial Governments claimed or exercised any dominion over the tribe or nation by whom it was occupied, nor claimed the right to the possession of the territory, until the tribe or nation consented to cede it." *Id.* at 403-4.

Chief Justice Taney's assumptions were utterly untrue but the majority opinion in effect brought the whole harsh European doctrine of discovery back into play. This was a complete change to the integration and assimilation policy that had been the federal Indian policy accepted by the original states and applied by the United States contained in the Northwest Ordinance. For example, the Treaty of Fort Schuyler between the Oneida Indian Tribe and the State of New York ceded all of the Oneida Indians lands to the State before the Constitution was in effect. *See City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197, 203 (2005). The Eastern States integrated the Indians that remained into American society. *See generally United States ex rel. Kennedy v. Tyler*, 269 U.S. 12, 16 (1925). In the West, all of the Pueblo Indians in New Mexico were considered citizens of the Territory of New Mexico from the moment it was formed in 1848. *See United States v. Joseph*, 94 U.S. 614 (1876). Their towns or pueblos were recognized as territorial and then state

municipalities. In California, the Spanish Missions had obliterated tribal affiliations leaving behind "Mission Indians" that were under the jurisdiction and protection of the State.

His incorrect assumptions did not prevent Chief Justice Taney from deciding as a matter of federal common law that the authority of the United States over all territories was unlimited by any act of Congress or any clause of the Constitution by declaring the Northwest Ordinance and Property Clause inapplicable to any territory acquired after the Northwest Territory in the *Dred Scott* decision. *Id.* at 432, 442. Chief Justice Taney actually changed the definition of "sovereign people" from applying to all natural persons into a political classification determined by the Congress. *Id.* at 404. This change was intended to prevent Negro people as a race from ever being included within the definition of "sovereign people" or citizen. By including the Indians as a race of people capable of being domesticated but still in a state of tutelage the Chief Justice turned the protective Indian trust relationship of the Marshall trilogy into a potential unlimited federal weapon.

All the Executive branch has to do is reclassify an area as "Indian country" or change the status of a group of persons to "Indians" to apply the separate unlimited territorial power unleashed in the *Dred Scott* decision. *See Holden v. Joy*, 112 U.S. 94 (1872). Chief Justice Taney's federal Indian trust is completely separate from the Constitution because the Indians are completely separate from the white society that comprises the Sovereign people. For purposes of Mr. Bryant's case the most important point here is that the first holding of *Dred Scott* was that any non-white person was not able to sue in a court of the United

States. *Id.* at 427. To this day the United States Supreme Court has abided by the *Dred Scott* ruling and never granted a Native American individual the right to be treated equally as a citizen of the United States in any court. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 39 (1978).

The slavery holdings of *Dred Scott* were mostly overruled by the 13th Amendment. The separate racial classification of "Indian" was deliberately preserved in the Indian Policy of 1871 as codified in the Revised Statutes of the Reconstruction era. This codification of the Reconstruction power over Indians preserved the territorial war powers used to fight the Civil War and to Reconstruct the Southern states following the war. *See* War Powers by William Whiting (43rd edition) p. 470-8. Even if an Indian left the reservation of territorial land made for his tribe and resided in town as a member of American society, he was deemed to be under the complete authority of Congress as an undomesticated person not capable of exercising the responsibilities of a citizen. Only Congress could change his status and grant citizenship. *See Elk v. Wilkins*, 112 U.S. 94 (1884).

The Congress and the federal agencies considered that the changes made to stop making treaties with the Indian tribes and to transfer the primary responsibility over the Indian tribes from the Department of State to the Department of the Interior in 1871 ended the assimilation policy of the Northwest Ordinance and began a much harsher direct war power policy toward the Indians. See 25 U.S.C. § 71, 1 Rev. Stat. § 441 and § 442. *See also U.S. v. Lara*, 541 U.S. 193, 201 (2004). The Indian policy of 1871 rejects the idea that Indians can ever become productive citizens of the United States in complete opposition to the

earlier assimilation policy. In the Revised Statutes setting the Indian Policy of 1871 are numerous statutes defining different types of Indian country. These definitions were not designed to protect the Indians from non-Indians trespassing or encroaching on lands reserved to them as the Indian country statute of June 30, 1834 was drafted. 4 Stat. 729, *See also Bates v. Clark*, 95 U.S. 204 (1877). The Indian country sections in the later Revised Statutes were done to allow the Indians and Indian tribes to be suppressed by military action on the reservation or if they left the reservations. *See generally Dick v. U.S.*, 208 U.S. 340, 352 (1908). With the 1871 Indian policy, numerous amendments to the term Indian country appeared. Most were new Indian criminal statutes.

The vilification of the Dawes General Allotment Act of 1887 done by the promoters of the Indian Reorganization Act (IRA) of June 18, 1934, 48 Stat. 984, 25 U.S.C. § 461 et seq., more than proves that John Collier and company relied on the Indian Policy of 1871 for their authority to restore tribal sovereignty. This did not change with the self determination era. The IRA brought the Indian Policy of 1871 and the *Dred Scott* rulings back into federal domestic law reinvigorating this Court's old rulings in *United States v. Kagama*, 118 U.S. 375 (1886), *Elk v. Wilkins*, 112 U.S. 94 (1884) and *Talton v. Mayes*, 163 U.S. 376 (1898).

II. WILL THIS COURT EVER TREAT INDIVIDUAL NATIVE AMERICANS AS CITIZENS OF THE UNITED STATES ENTITLED TO EQUAL PROTECTION OF THE LAWS UNDER THE CONSTITUTION OF THE UNITED STATES?

This Court has allowed the individual Indian to be denied all constitutional rights and still does not seem to realize that this status derives not from anything the Congress or Executive branch have done but derives from the simple fact that the Courts of the United States have since the *Dred Scott* decision denied all individual Native Americans the citizenship status of having the right to sue and pursue their constitutional rights in the courts of the United States. This is particularly heinous in this case because of how the United States spends pages in their opening brief recounting the specific provisions of the Indian Civil Rights Act that supposedly give Mr. Bryant due process protections under the law. U.S. Opening brief at 50-54. Civil rights are only real when they can be enforced in a court of law. Otherwise, no matter how wonderful the language or the rights conferred they mean absolutely nothing. This Court again applied the *Dred Scott* ruling in *Santa Clara Pueblo v. Martinez* by upholding and applying the rationale of *Elk v. Wilkins*, 112 U.S. 94 (1884) that Mrs. Martinez had no right to sue as a citizen of the United States in a federal court to challenge how the laws or actions of an entity recognized and funded by the United States was treating her. *Santa Clara* at 71.

A. The Court in *Santa Clara Pueblo* Was Correct that Congress Did Not Intend the Indian Civil Rights Act to Create Any Enforceable Rights in Individual Native Americans

While the second part of this section will take this Court to task over its decision in *Santa Clara Pueblo* the same is not true for the holding of this Court that the ICRA was not intended by Congress to confer any enforceable individual right to sue on Native Americans. Congress when it passed the ICRA had already passed the major act presented by Richard Nixon to President Johnson and championed by Senator Robert Kennedy to change the structure of our government to take full advantage of the Indian status and use of the territorial war powers in Public Law 89-554, 89th Congress, Sess. 2, 80 Stat. 378-663, Sep. 6, 1966, "To Enact Title 5, United States Code, Government Organization and Employees, codifying the general and permanent laws relating to the organization of the Government of the United States and to its civilian officers and employees." This law contains 43 U.S.C. § 1457 that was directly copied from 1 Rev. Stat. § 441, the first provision of the codified Indian policy of 1871.

Each Justice of this Court should take a look at this act of Congress just to see how cleverly written it is to undo the main constitutional structural safeguards of checks and balances and separation of powers. The law uses the Indian status and the unlimited territorial power to equate the authority of the United States over states as the same as its authority over territories. This same formula is applied repeatedly to change in every section of the law what had been considered

distinctions between state and federal authority. It is not surprising that Justice Rehnquist tried to confront this very law and its next extension in 1974 by applying principles of federalism in *National League of Cities v. Usery*, 426 U.S. 833 (1976) without success. General principles of constitutional law were no match for this extra constitutional territorial war power authority that had been deliberately preserved following the Civil War. Richard Nixon had a goal and a plan to forever change our government by using the status of the Indians and he succeeded in getting this into law before he became President.

It makes sense that a limited Indian civil rights act was being discussed at the same time that the bigger deal between the Republican and Democratic parties was being executed in 1966 just as this Court reports in *Santa Clara*. *Id.* at 56. The potential flaw in the Nixon plan was for the Native Americans to actually gain full individual rights as citizens. It was imperative that Congress, the Executive branch and this Court accepted and processed Native American rights as collective tribal rights that could not be individualized. Passage of the ICRA did this well. If the Native Americans lost their special status then Nixon's whole plan could be undone because the justification for the separate and unlimited territorial power created in the *Dred Scott* decision would be contradicted.

Justice Marshall correctly decided with an almost total majority of the Court that the ICRA was not intended to create any new rights or causes of action for individual Native Americans in *Santa Clara Pueblo*. Then citing *Elk v. Wilkins* that is entirely based on *Dred Scott* they again denied a Native American any and all individual rights as a citizen. *Santa Clara* at 71.

b. *Santa Clara Pueblo* Should be Distinguished to Allow all Native Americans Rights to Due Process of Law in the Federal Courts

It is time for this Court to step up and stop discriminating against Native Americans and grant all individual Native Americans the same constitutional rights held by all other citizens of the United States in the federal courts. Is this Court ever going to learn that the attorneys for the United States are advocating a position for their client and are not neutrally representing the people? The more power the federal government gets the more it wants. This has resulted in a virtual total breakdown of the functioning of the Congress and Executive branches. People are angry and frustrated because the rule of law does not apply to the federal government. The elected branches have foolishly and greedily held on to the extra constitutional powers to expand the reach of the federal government. Both political parties are to blame for this reality.

This Court has allowed the elected branches to portray "Indians" in the 21st century as still more tribal than as citizens of the United States. In the days of mass media and the internet nothing could be more ridiculous. There is no question that Indians living on reservations are terrified of the unlimited powers exercised by their tribal governments and the Bureau of Indian Affairs officials over them. Individual Indians will not speak out because they have no protection for exercising free speech. Tribal courts which were cited in *Santa Clara Pueblo* as protectors of individual Indian rights are in actuality the very worst offenders. Not only have tribal courts utterly failed to enforce any of the provisions of the ICRA they have become completely political entities controlled by tribal

governments. Even the courts of the Navajo Nation which were once touted as the flagship tribal courts are so completely broken down and politicized that multiple court orders contradicting each other usually exist in any case today. Congress has not protected the Native Americans they have used them just as Chief Justice Taney did in 1857.

The Rehnquist Court showed a real interest in preserving and restoring aspects of the doctrine of federalism to limit ever expanding federal authority against the rights of individuals. *United States v. Lopez*, 514 U.S. 549 (1995); *Printz v. United States*, 521 U.S. 898 (1997). The Rehnquist Court also acknowledged that restoring tribal interests in mostly non-Indian areas upsets the "justifiable expectations" of the property owners and citizens of that area. *See City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197 (2005). The Rehnquist Court tried for many years to introduce due process and equal protection limitations in federal Indian law without success. See *Duro v. Reina*, 495 U.S. 676 (1990) and *Rice v. Cayetano*, 528 U.S. 495 (2000). The Roberts Court has done nothing but allow the situation to get worse again.

The whole reason for the creation of the Supreme Court as the third branch of government was to allow judicial review to enforce the rule of law against the elected branches. Without a Supreme Court there was no way to protect individual rights from both the state and federal government's overstepping of constitutional bounds. Without the enforcement of the rule of law the Constitution is just an old document that has nothing to do with the authority asserted by the federal government today.

As long as this Court countenances real invidious racial discrimination by the United States against all

Native Americans as it has done since 1857, there is no hope or rule of law. This *amicus* is very frustrated in continually having to explain to the Native Americans who contact the organization for help that there is no path that guarantees a Native American any due process of law or protection for speaking out. We carefully explain that the risk they are taking is very real because we have seen tribal members seriously harmed by trying to make a difference. This is the reality of this Court continuing to deny any and all rights to Native Americans.

This Court has done more to protect the constitutional rights of accused terrorists as it did in *Hamdan v. Rumsfeld*, 585 U.S. 557 (2006) than it has to protect any Native American born and raised in this nation. In *Rasul v. Bush*, 542 U.S. 466, 480-4 (2004) this Court did not accept the declaration of the military and the Executive that the Guantanamo Bay Naval Station was separate "territory" not under the direct control of the United States. This holding allowed this Court to determine whether the prisoner (and all other prisoners) accused of terrorism held at the Naval Station by officials of the United States was entitled to the protections of the Constitution of the United States. How is it possible that this Court continues to deny this same judicial review to Native Americans?

This Court stepped up and protected the rights of a little girl being subjected to the Indian Child Welfare Act and was greatly praised for its decision. Even Congress and the Executive had little to say in opposition. This Court is at its strongest when it protects the civil rights and civil liberties of the people of the United States. This Court should distinguish *Santa Clara Pueblo* and state that Mr. Bryant is a full citizen of the United States entitled to all of the rights

conferred by the Constitution and Bill of Rights. As part of this ruling the Court must end the racially derogatory classification of Indian country and find that all citizens within the borders of the United States are subject to the Constitution and its amendments. All this Court is doing is giving to individual Native Americans the same rights as any other citizen. This allows Congress to be the first to sort out the implications of what it means for Native Americans to have constitutional rights.

III. THIS COURT CAN ENFORCE A DECISION CONFERRING CONSTITUTIONAL RIGHTS ON THIS INDIVIDUAL NATIVE AMERICAN

This Court cannot fix the numerous acts of Congress or the actions of the Executive Branch that treat Native Americans as less than citizens. But this Court as discussed above can itself stop treating them as less than citizens by conferring on Mr. Bryant the full rights of a citizen of the United States entitled to all constitutional and Bill of Rights protections. All CERA/CERF is proposing is for this Court to itself stop discriminating and declare that Mr. Bryant is a citizen of the United States entitled to due process of law in all courts of the United States. This Court does not need to change any federal statute to do this. All it has to do is reverse or correct its own legal precedents.

The reason this decision would be completely enforceable is that there is no way for the Congress or Executive to pass a law to overrule it. This is a constitutional ruling and as such is not subject to being overridden by Congress. That said the political reality of Congress and or the Executive actually passing a law to put the Native Americans back into a state of

pupilage and make them less than full citizens again would be very interesting to see. Neither Congress or the Executive Branch can openly write a law that would claim to deprive Native Americans of their constitutional rights without setting off a major debate and bringing all of the issues regarding how the tribal status has been maintained into the open. Once it is revealed that the Indians were kept in this status because of the *Dred Scott* decision the debate would be over.

This debate needs to happen to resolve the problems that *Dred Scott* created with the territorial war powers. Changing federal Indian policy will allow the restoration of the application of the Property Clause to all territories of the United States. Congress was only supposed to have plenary territorial war power authority to determine the processes and rights of persons in the territories until those territories became States. *See American Insurance Co. v. Canter*, 26 U.S. 511 (1828). This was the very requirement altered in *Dred Scott* by finding that the Property Clause and Northwest Ordinance only applied to the Northwest Territory. *Scott* at 442. The plenary power over Indians has been used to create plenary power over the States and all individuals. The only way to correct this is for this Court to step up and end the racial discrimination against individual Native Americans and finally give people like Michael Bryant, Jr. the same due process rights as all other Americans.

Conclusion

This Court should uphold the decision of the Ninth Circuit Court of Appeals and agree that even though Michael Bryant, Jr. is a Native American he has

the same constitutional due process rights as any other citizen of the United States.

Respectfully submitted,

James J. Devine, Jr.
Counsel of Record
128 Main Street
Oneida, New York 13421
(315) 363-6600